

STATE OF MICHIGAN
COURT OF APPEALS

KELLY S. OSTROWSKI,
Plaintiff-Appellee,

UNPUBLISHED
September 1, 2005

v

KEITH J. OSTROWSKI,
Defendant-Appellant.

No. 260880
Oakland Circuit Court
LC No. 03-676014-DM

Before: Saad, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant appeals the trial court's order that granted plaintiff's motion for summary disposition under MCR 2.116(C)(8), and denied defendant's motion to change custody of the parties' minor children. We affirm.

I. Great Weight of the Evidence

Defendant contends that the trial court based its denial of his change of custody motion on findings of fact that were against the great weight of the evidence. We disagree.

In child custody cases, we review factual findings under the great weight of the evidence standard, discretionary rulings for an abuse of discretion, and questions of law for clear error.¹ *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000); MCL 722.28. We review the grant of summary disposition de novo. *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004).²

¹ Further, we must affirm all custody orders unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. MCL 722.28; *Fletcher v Fletcher*, 447 Mich 871, 876-877 (Brickley, J.), 900 (Griffin, J.); 526 NW2d 889 (1994); *Harvey v Harvey*, 257 Mich App 278, 283; 668 NW2d 187 (2003).

² A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone; the motion may not be supported with documentary evidence. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). All factual allegations in support of the claim are accepted as
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In his appeal brief, defendant takes the trial court judge's statements out of context and argues that the court's ruling was erroneously based on those "factual findings." Specifically, he claims that the trial court erroneously made factual determinations regarding the acrimonious relationship between plaintiff and defendant. The record reflects that the trial court made statements regarding the parties' relationship, but the court subsequently made clear that, as a matter of law, their disputes are not a proper basis to warrant changing custody. In relevant part, the court stated:

Parenting time disputes are not a proper basis for changing custody. . . .
From the allegations, it does not appear that the allegations of the behavior of the children or parties are relevant to the best interest factors alleged to be in dispute by Defendant.

The trial court further held that it would be improper to change custody based on plaintiff's alleged violations of the judgment of divorce.

It is clear from the record that the trial court's statements did not constitute "findings of fact" for purposes of making its ruling. Rather, the court accepted defendant's allegations as true and found that he failed to meet his burden to show proper cause or a change in circumstances. The trial court concluded that defendant's allegations were not relevant to the best interest factors and plaintiff's contempt was not a proper basis to warrant a change of custody. Because the trial court applied the correct standard before it rendered the judgment, we find no merit in defendant's argument.³

II. Cause or Change in Circumstances

Defendant also complains that the trial court erroneously ruled that he failed to establish proper cause or a change in circumstances to warrant revisiting the parties' custody order.

A custody award may be modified on a showing of proper cause or change of circumstances. MCL 722.27(1)(c). "[P]roper cause means one or more appropriate grounds that have or could have a significant effect on the child's life to the extent that a reevaluation of the child's custodial situation should be undertaken." *Vodvarka v Grasmeyer*, 259 Mich App 499, 511; 675 NW2d 847 (2003). To determine whether "proper cause" exists, "trial courts can look

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true, as well as any reasonable inferences or conclusions which can be drawn from the facts, and construed in the light most favorable to the nonmoving party. *Adair, supra*, p 119. However, a mere statement of a pleader's conclusions, unsupported by allegations of fact, will not suffice to state a cause of action. *Churella v Pioneer State Mutual Ins Co*, 258 Mich App 260, 272; 671 NW2d 125 (2003). The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Adair, supra*, p 119.

³ See *Vodvarka v Grasmeyer*, 259 Mich App 499, 512; 675 NW2d 847 (2003) (noting that the trial court may accept as true the facts allegedly comprising proper cause or a change of circumstances, and then decide if they are legally sufficient to satisfy the standard).

for guidance in the twelve factors developed by the Legislature for determining what is in the child's best interests.” *Id.*, citing MCL 722.23(a)-(1).

We conclude that defendant failed to provide support for his allegations under the best interest factors. Plaintiff has been and remains a primary caretaker of the children and a stay-at-home mother since the birth of the children. There is no basis for defendant’s allegations regarding factors (b) and (c), that plaintiff has been unable to parent the children or provide appropriate care since the entry of the judgment of divorce. Further, under factors (f) and (j), defendant’s alleged disputes with plaintiff and alleged problems communicating with the children are long-term problems. Under the circumstances of this case, these factors do not constitute proper cause or a change in circumstances. Clearly, they do not amount to a material change of the custodial conditions.⁴ Therefore, we conclude that the trial court did not err when it held that defendant did not meet the threshold requirement to show proper cause or a change of circumstances.

Having failed to make this preliminary showing, the trial court was precluded from holding an evidentiary hearing to change custody. *Vodvarka, supra* at 508, citing *Dehring v Dehring*, 220 Mich App 163, 164-165; 559 NW2d 59 (1996). Accordingly, we hold that the trial court did not err by denying defendant’s motion to change custody. *Phillips, supra* at 20.

Affirmed.

/s/ Henry William Saad

/s/ Joel P. Hoekstra

/s/ Jane E. Markey

⁴ If defendant’s allegations were true, this Court has stated that issues regarding parenting time and even the contempt of one of the parties are not sufficient to establish proper cause or a change in circumstances that would trigger a review of an existing custody order. *Vodvarka, supra* at 509-510, citing *Adams v Adams*, 100 Mich App 1, 13; 298 NW2d 871 (1980).